Supreme Court, U. S.
FILED
MAR 20 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1472

JAMES J. CASHIN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPERIOR COURT, STATE OF NEW JERSEY

IRVING ANOLIK
Co-Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

JOHN P. RUSSELL
Co-Attorney for Petitioner
921 Bergen Avenue
Jersey City, New Jersey 07306
(201) 659-8107

IRVING ANOLIK
Of Counsel

3266 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Statement 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Background of the Case 3

Reasons for Granting the Writ:

I. The petitioner was compulsorily subjected to an involuntary and suggestive identification procedure in October of 1974 when Officer Vuocolo ordered a vehicle in which Cashin was riding to be stopped by local police so that the alleged victim of an assault occurring in 1972 could view Cashin.

There was no probable cause to halt the vehicle since the officers had no warrant and no arrest was made.

This procedure resulted in the unconstitutional seizure of petitioner's image, thus violating his constitutional rights. 5

II. There was insufficient evidence to have warranted a conviction beyond a reasonable doubt and the case therefore should not have been submitted to the jury. 7

Contents

Page

III. The compulsory viewing by Mathis to which Cashin was subjected when his vehicle was seized without probable cause, is the equivalent of making Cashin give an involuntary statement. 8

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Brown v. Illinois, 422 U.S. 590 ..... 3, 5, 6,

Chapman v. California, 386 U.S. 18 ..... 3, 7

Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 60 ..... 2, 6

Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 ..... 2, 5, 6

Fullbright v. United States, 392 F.2d 432 7

Jackson v. Virginia, 443 U.S. ____, 99 S. Ct. 2781, 61 L. Ed. 2d 560 ..... 3, 8

Kastigar v. United States, 406 U.S. 441 ..... 3, 8

Katz v. United States, 389 U.S. 347 ..... 2, 5, 6

Miranda v. Arizona, 384 U.S. 436 8

Nardone v. United States, 308 U.S. 338 ..... 2, 6

Contents

Page

New Jersey v. Portash, 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 ..... 3, 8

People v. Caserta, 19 N.Y. 2d 18 8

People v. Napoletano, 50 A.D. 2d 83 8

People v. Trowbridge, 305 N.Y. 371 8

Schneckloth v. Bustamonte, 412 U.S. 218 8

Silverthorn Lumber Co. v. United States, 251 U.S. 385 ... 6

Wong Sun v. United States, 371 U.S. 471 6

Statute Cited:

28 U.S.C. §1257(3) 2

United States Constitution Cited:

Fourth Amendment 2, 3, 6

Fifth Amendment 2, 3, 6

Sixth Amendment 2, 3, 6

Fourteenth Amendment 2, 3, 6

APPENDIX

Order of Supreme Court of New Jersey Denying Petition . 1a

Opinion of Superior Court of New Jersey 2a

In The

Supreme Court of the United States

October Term, 1979

No.

JAMES J. CASHIN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPERIOR COURT, STATE OF NEW JERSEY

STATEMENT

Petitioner respectfully prays that this Court issue a writ of certiorari to review the order of the Appellate Division, Superior Court, State of New Jersey, rendered the 28th day of November 1979, affirming a judgment of the Superior Court of the State of New Jersey Law Division (Criminal), Ocean County, convicting petitioner of assault with an offensive weapon and assault with intent to kill, and was sentenced to 1 to 3 years imprisonment, concurrently.

OPINION BELOW

The per curiam opinion of the Appellate Division Superior Court is reproduced in the appendix. The Supreme Court of the State of New Jersey, which denied a petition for certification, contained no opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Supreme Court of the State of New Jersey denied a petition for certification on January 14, 1980. The Superior Court, Appellate Division, affirmed the judgment of conviction on November 28, 1979.

QUESTIONS PRESENTED

1. Whether petitioner's constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution were violated when New Jersey police officers, without a warrant, seized an automobile in which petitioner was riding, and compelled him to submit to a suggestive one-man identification procedure by the alleged victim in the case? Since no arrest was thereafter made, it was obvious that the State lacked probable cause to have seized the vehicle in the first place. (*Cf., Dunaway v. New York,* 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824; *Delaware v. Prouse,* 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 and *Nardone v. United States,* 308 U.S. 338.)

2. Whether the seizure, without probable cause, and without a warrant, of the image of a suspect for the purpose of a suggestive identification procedure, violates the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and whether this type of seizure is a cognate violation to the seizure of a confession (*Dunaway v. New York, supra*) or the seizure of a voice (*Katz v. United States,* 389 U.S. 347)?

3. Whether compelling petitioner to submit to a suggestive lineup procedure, after unconstitutionally stopping his vehicle without probable cause, in essence compelled petitioner to give evidence against himself, therefore mandating that the identification procedure be suppressed (*New Jersey v. Portash,* 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501; *Kastigar v. United States,* 406 U.S. 441 and *Brown v. Illinois,* 422 U.S. 590)?

4. Whether the Appellate Division's assertion that petitioner's rights were not violated beyond a reasonable doubt are tenable in view of the importance attached to the identification by the prosecution and the substantial post-trial recantation by the victim (*Chapman v. California,* 386 U.S. 18)?

5. Whether there was sufficient evidence to have warranted a guilty verdict beyond a reasonable doubt (*Jackson v. Virginia,* 443 U.S. ____, 99 S. Ct. 2781, 61 L. Ed. 2d 560)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

BACKGROUND OF THE CASE

Petitioner James J. Cashin was indicted in Ocean County, New Jersey, for the crimes of assault with an offensive weapon and assault with intent to kill.

The sole basis for petitioner's conviction was the testimony of the alleged victim, Robert Mathis. Another alleged witness, Nicholas Granozio, testified at the trial that he could not identify Cashin as the assailant. In addition, there were wide discrepancies in the description given by Mathis after the incident to various officials.

An investigator by the name of Vuocolo, who arranged to have an automobile in which Cashin was riding halted by local police, in October of 1974, so that Mathis would have an opportunity to view Cashin, testified at the trial that he was present at this identification procedure which was conducted without probable cause; without any warrant, and without any lineup.

The original incident occurred in 1972, but the compulsory viewing of the petitioner did not occur until October of 1974. A description given by the victim after the incident to the police was that the assailant was 5'6" to 5'8" in height. Cashin is over 6'0" tall.

In a post-trial affidavit, Mathis asserted that since the incident he has seen a dozen other men who looked similar to the man who shot him, "even more so than Mr. Cashin." He added:

> "Therefore, I cannot be positive, and Nick Granozio may have been right when he testified Mr. Cashin was not the man who shot me."

Prior to the identification made when Cashin's automobile was forceably halted without probable cause, Mathis allegedly identified Cashin at the Wobbly Barn, following a call by Officer Vuocolo saying that his assailant was apparently in the Barn and gave Mathis a verbal description of Cashin.

REASONS FOR GRANTING THE WRIT

I.

The petitioner was compulsorily subjected to an involuntary and suggestive identification procedure in October of 1974 when Officer Vuocolo ordered a vehicle in which Cashin was riding to be stopped by local police so that the alleged victim of an assault occurring in 1972 could view Cashin.

There was no probable cause to halt the vehicle since the officers had no warrant and no arrest was made.

This procedure resulted in the unconstitutional seizure of petitioner's image, thus violating his constitutional rights.

We recognize that the issue herein raised is somewhat novel, but we maintain that it is a cognate and logical extension of the Fourth Amendment, as exemplified by such cases as *Dunaway v. New York,* 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (seizure of a confession after an unlawful seizure of a person); *Katz v. United States,* 389 U.S. 347 (seizure of a voice after an illegal eavesdrop) and *Brown v. Illinois,* 422 U.S. 590 (seizure of a statement after an illegal arrest).

In fact, no indictment followed for about eight months and the officers who had stopped Cashin's vehicle at the request of Officer Vuocolo declared they had no probable cause to detain him and let the vehicle go, after the viewing, however, had occurred.

While the prosecution argued below that the viewing of Cashin after his vehicle was illegally stopped was merely cumulative, it is obvious that Officer Vuocolo felt it was necessary, otherwise he would not have had the vehicle halted. Moreover, this was the first and only occasion where officers other than Vuocolo could corroborate the fact that Cashin was actually present for a viewing. The prior viewings in the Wobbly

Barn were made without any other witnesses present except the victim and Officer Vuocolo, whose animus and credibility were of questionable value.

Since this Court has already condemned illegal seizures to obtain a confession (*Dunaway v. New York, supra*), and the seizure of a voice by illegal eavesdrop (*Katz v. United States, supra*), as well as the illegal stopping of an automobile to obtain a statement (*Brown v. Illinois, supra*), we submit that a logical corollary of these decisions is that a person may not be illegally detained without probable cause for the purpose of viewing him, *i.e.*, to seize his image in order to obtain evidence against him. (*Cf., Delaware v. Prouse,* 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660.)

This improper halting of a vehicle to compel a viewing of a suspect who has a perfect expectation of privacy traduces the letter and spirit of the foregoing cases as well as the Fourth, Fifth, Sixth and Fourteenth Amendments. Moreover, this viewing was a "poison fruit" of the illegal detention of both Cashin and his vehicle (*Nardone v. United States,* 308 U.S. 338; *Wong Sun v. United States,* 371 U.S. 471 and *Silverthorn Lumber Co. v. United States,* 251 U.S. 385).

It cannot be overemphasized that no attempt to obtain a warrant of any sort was made, nor was Cashin ever informed about the cause of his detention and that of the vehicle. It goes without saying that petitioner had an expectation of privacy riding in a vehicle.

An argument made below that if the alleged victim had by chance peered into the vehicle Cashin would have been in open view, is untenable. The fact of the matter is that this is not the way it happened. By a similar process of reasoning, the defendant-petitioner might have been viewed while standing at a window, or swimming at the beach, or so forth. The incident in the case at bar, however, did not occur by accident or by coincidence, but rather in a calculated, deceitful manner, by

forceably halting an automobile, without probable cause, in which petitioner was riding, and compelling him to submit to a view by Mathis. (*Cf., Fullbright v. United States,* 392 F. 2d 432.)

II.

There was insufficient evidence to have warranted a conviction beyond a reasonable doubt and the case therefore should not have been submitted to the jury.

The incident which occurred herein transpired in the middle of 1972 in a dark parking lot in Ocean County. The victim of the shooting, Mathis, was accompanied by one Nicholas Granozio at the time of the occurrence. Granozio stated to the police that he would never forget the person who shot Mathis, but when he was asked to look at Cashin, he was unable to identify Cashin at all as the perpetrator of the crime. This was not surprising since the original identification given to the police was of a man between 5'6" and 5'8" tall, whereas Cashin was over 6'0" in height. Moreover, the complainant had previously identified two other persons as his assailant, one of whom disappeared and was never heard from again.

Over two years after the incident, Investigator Vuocolo suddenly telephoned Mathis to come to the Wobbly Barn to determine if he could identify Cashin as the assailant. At this occasion Vuocolo gave Mathis a description of Cashin and supposedly Mathis identified Cashin in the bar. If there had been a positive identification at the Wobbly Barn, as Vuocolo said there had been, there would have been no rhyme or reason to ask the Toms River Police to seize a motor vehicle in which petitioner was riding so that another opportunity could be given to Mathis to again look at Cashin. In the Wobbly Barn only Vuocolo was present, but several officers were on hand when the identification of Cashin in the motor vehicle was allegedly made. This can hardly be said to come within the de minimus rule of *Chapman v. California,* 386 U.S. 18.

This case must also be viewed in the light of the subsequent declarations by the only witness capable of testifying as to an identification (Mathis), that it is quite possible he was mistaken.

Thus, we maintain that no rational Trier of Fact could have found guilty beyond a reasonable doubt, and, therefore, the case should never have been submitted to a jury (*Jackson v. Virginia,* 443 U.S. ____, 99 S. Ct. 2781, 61 L. Ed. 2d 560).

In addition to the foregoing, the investigator, Vuocolo, prior to any challenge to the credibility of Mathis, was permitted to testify in the direct case of the prosecution, that he was present when the witness, Mathis, identified petitioner (*cf. People v. Trowbridge,* 305 N.Y. 371; *People v. Caserta,* 19 N.Y. 2d 18; and *People v. Napoletano,* 59 A.D. 2d 83).

III.

The compulsory viewing by Mathis to which Cashin was subjected when his vehicle was seized without probable cause, is the equivalent of making Cashin give an involuntary statement.

It is axiomatic that if no warnings were given before a statement was taken of a person under detention, that such a statement would have to be suppressed under *Miranda v. Arizona,* 384 U.S. 436. Similarly, compelled testimony would be suppressed unless immunity were granted and the same should be true of a compelled involuntary identification (*New Jersey v. Portash,* 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 and *Kastigar v. United States,* 406 U.S. 441).

Finally, under *Schneckloth v. Bustamonte,* 412 U.S. 218, the lack of a warning would be a factor to be considered in the voluntariness of a search and seizure.

In the case at bar, of course, no warnings or other advice was ever given to Cashin.

CONCLUSION

The petition for certiorari should be granted to review the important questions herein presented.

Respectfully submitted,

IRVING ANOLIK
Co-attorney for Petitioner

JOHN P. RUSSELL
Co-attorney for Petitioner

IRVING ANOLIK
Of Counsel

APPENDIX

ORDER OF SUPREME COURT OF NEW JERSEY DENYING PETITION

SUPREME COURT OF NEW JERSEY
C-396 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES J. CASHIN,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4660-77 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of January, 1980.

s/ Stephen Townsend

OPINION OF SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4660-77

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES J. CASHIN,

Defendant-Appellant.

Argued November 5, 1979 — Decided Nov. 16 1979

Before Judges Seidman and Devine.

On appeal from Superior Court, Law Division, Ocean County.

Mr. Irving Anolik, of the New York bar, appearing *pro hac vice,* argued the cause for appellant (Mr. John P. Russell, attorney).

Mr. Raymond J. Marquez, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Mr. Marquez on the brief).

PER CURIAM

Defendant was charged in a two-count indictment with assault with an offensive weapon and assault with intent to kill. He was tried to a jury, found guilty as charged and sentenced to

two concurrent State Prison terms of one to three years. The contentions on appeal, as set forth in defendant's brief, are that (1) the court's charge on identification had the tendency to mislead the jury and the court's references to facts were not supported by testimony, (2) the verdict was against the weight of evidence, (3) testimony of a witness concerning his alleged photographic identification of defendant was improperly admitted, (4) identification testimony of another witness was also improperly admitted and (5) the prosecutor's comments to the jury during summation denied defendant his right to a fair trial.

We have thoroughly reviewed the record and we are completely satisfied that these contentions and the arguments advanced in support are clearly without merit. *R.* 2:11-3(e)(2).

At oral argument, for the first time, the further contention was advanced that an out-of-court identification of defendant by the witness Mathis was tainted by a "search and seizure" of defendant in violation of his Fourth Amendment rights. The rationale is that about two years after an incident in which Mathis was allegedly shot by a person during an altercation, a police officer requested Mathis to meet him at a night club in Toms River in order to "look at some people that were in there." When Mathis arrived, he was told to walk around the bar and see if he recognized anyone. He did so and recognized his assailant, later identified as defendant. He pointed him out to the officer and later reiterated the identification. Mathis and the officer then left the night club and waited in the officer's car until defendant emerged, at which time Mathis again told the officer that was the man who had shot him. The two followed the car in which defendant and another person drove away. The officer radioed to his headquarters requesting that the car be stopped. It was, and the officer asked Mathis to look at the occupants of the car. He did so and once more identified defendant as the assailant.

Opinion

Counsel argues that since there was no probable cause to stop the automobile and no arrest followed, Mathis' view of defendant and his perception of the man as the culprit constituted an illegal search of the vehicle and a seizure of defendant by means of the visual impression that was obtained by Mathis. Even if credence were given to this novel concept, we conclude, in light of the three earlier positive identifications made by Mathis, that if the last identification suffered in any way from a constitutional infirmity, the admission of the testimony at the trial was harmless beyond a reasonable doubt. *Chapman v. California,* 386 *U.S.* 18, 24 (1967); *State v. Macon,* 57 *N.J.* 325, 340-341 (1971).

The judgment of conviction is affirmed.

A TRUE COPY
s/ Elizabeth McLaughlin
Clerk